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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

REBECCA A. BOOSTROM,
Petitioner,

--v.--

STEPHEN BACH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is due process denied in a Small Claims court when Summary Judgement is granted when the court does not state it is hearing the Defendant's Motion for Summary Judgement, does not have oral argument,does not receive evidence, and asks only the defendant, an attorney representing himself, two questions in legal terminology about his allegations on the statute of limitations during the time the court stated it was hearing a motion filed by the Plaintiff, pro se.

2. Does the Indiana Supreme Court's first impressions opinion interpreting a Small Claims Rule to create a new requirement that paying a Small Claims filing fee is a prerequisite to commence a Small Claims action a denial of due process by lack of notice of the law by rule to unrepresented Small Claims plaintiff(s) who follow all the many detailed requirements in said rule.

LIST OF PARTIES

Petitioner, Rebecca Boostrom

Respondent, Stephen Bach

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REPLY TO BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The *Respondent's Brief in Opposition*, pursuant to U.S. Supreme Court Rule 15.1, does not point out any perceived misstatements of the Petitioner in her Statement of the Case.

The *Respondent's Brief*, Statement of the Case, p. 1, omits stating that the complaint was mailed by certified mail to the clerk on January 12, 1994. J.A. 34. The Indiana Supreme Court's opinion stated the complaint was

mailed by certified mail (J.A.) and also "filed"(J.A. 11.n.2) on January 12, 1988.

The *Respondent's Brief*,p.1,misrepresents[1] the Motion to Correct Minutes, filed under T.R. 60 (A) and T.R. 5 (E) (R. p. 28-32).

The *Respondent's Brief*,p.2, misrepresents that Ms. Boostrom did not file a response regarding damages. On April 2, 1990, she had filed a "More Detailed Statement" (R.12-22); on June 4, 1990, "Plaintiff's Response to Damages Issue in Motion for Summary Judgement" (R.,p. 68) and "Petition to File a Verified Amended Complaint" (R. 33). These filings were not heard.

The *Respondent's Brief*, p. 2,3, has an invalid printing of the submitted written entry of summary judgement (J.A. 38) by omitting Bach's handwriting dating it June seventh, 1988, and his signature as composer.

The Respondent omits the two petitions for rehearing and rulings. Cf. *Pet'r Br.*,7-10.

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[1] However, a grant of the Motion to Correct Minutes would have precluded the need to hear evidence on the accrual date Bach alleged as his only defense.

REASONS WHY THE PETITION SHOULD BE GRANTED

REPLY TO BRIEF IN OPPOSITION ON PETITIONER'S QUESTION TWO[2] PRESENTED FOR REVIEW

In Indiana Small Claims Rule 2 (J.A. 73-74), the language is unambiguous, plain and clear. The Indiana Supreme Court based its interpretation (J.A. 6) on only part (A), while ignoring the clear description of the contents of (A) found in part (B).[3]

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[2] The reply in support of the two questions in the Petition for Writ of Certiorari are presented here in reverse order.

[3] Indiana Rules of Court (1990). Indiana Small Claims Rule 2: COMMENCEMENT OF ACTION.

(A) In General. An action under these rules shall be commenced by the filing of an unverified notice of claim in a court of competent jurisdiction.

(B) Form of Notice of Claim. The notice of claim shall contain:

(1) The name of the court;

(2) The name, address and telephone number of the claimant and defendant(s);

(3) The place, date and time when the parties are to appear for trial of the claim, which date shall not be less than ten [10] days nor more than forty [40] days after service of said notice of claim;

(4) A brief statement of the nature and amount of the claim and (a) If the claim arises out of written contract, a copy shall be attached; however, the fact that a copy of such contract is not in the custody of the plaintiff shall not bar the filing of the claim; (b) If the claim is on account, an itemized statement shall be attached;

(5) A statement that the parties may appear either in person or by an attorney;

(6) An instruction to the defendant that the defendant should bring to the trial all documents in the possession of or under the control of the defendant concerning the claim;

(7) A statement that if the defendant does not

A Small Claims plaintiff should file certain listed items to commence an action. Nowhere does the rule provide that a filing fee must be paid to commence an action. The Indiana Supreme Court's interpretation of an unambiguous Small Claims rule by creating a new rule through interpretation is contrary to the law of statutory construction.

Respondent's Issue # 3 (A): " Mrs. Boostrom Had Actual Notice That She Was Required To Pay The Filing Fee Upon Commencement Of The Action " (Resp't Br., p. 9).

In none of the statements Bach quotes does Ms. Boostrom state when she paid the filing fee previously or indicate she knew from the prior eviction and rent and damages actions that (a) a filing fee had to be

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wish to dispute the claim he may nonetheless appear for the purpose of allowing the court to establish the method by which the judgement shall be paid;

(8) The name, address and telephone number of the person designated by the court with whom the defendant may communicate if defendant is unable to appear at the time or place designated in the notice;

(9) A statement that a default judgment may be entered against the defendant if he fails to appear for trial; and

(10) Notice of the defendant's right to a jury trial and that such right is waived unless a jury trial is requested within ten [10] days after receipt of the notice of claim; and

(11) Any additional information which may facilitate proper service. [As amended November 10, 1988, effective January 1, 1989.] (J.A.73-74)

paid upon commencement of the action ; (b) when commencement of an action occurs; (c) exactly when a filing fee has to be paid; or (d) the consequences of any "late" payment of a filing fee. Moreover, in eviction actions, a statute of limitations is not at issue.

Bach mislabels as a finding the court's reasoning that: she "is well aware of the rules requiring a filing fee." But a perusal of the transcript will show she never mentioned the controlling rule, Ind. Sm.C. R. 2, but argued from an Indiana authority interpreting T.R. 3 (J.A. 45, 46, 50, 56, 57).

Respondent's Issue # 3 (B) correctly states that Ms. Boostrom forgot to pay the filing fee. Her situation is comparable to that in *Brady v. Eastern Indiana Production Credit Assoc.*, 396 N.E. 2d, where the Indiana Supreme Court (1978) decided that the filing fee for appeals and original actions filed in the Indiana appellate courts may be paid late. She also argued from that caselaw without knowing its title (J.A. 53-54,R.100).

In the *Respondent's Brief*, Bach does not

dispute the account in the *Petition for Writ*, p. 15, of the failure of the Vanderburgh County courts to comply, prior to 1994, with Ind. Sm.C. R. 13 (J.A. 75) to publish a Small Claims manual of the rules and make it available to each litigant.

Respondent's Issue # E (C): "The Indiana legislature has for 43 years required that the filing fee be paid upon commencement of the action" (*Resp't Br.*, p. 14).

Bach does not cite any Indiana caselaw, and fails to cite or quote Ind. Code Ann. § 33-19-5-5 which the transfer opinion stated was controlling in this cause. J.A. 8, n.1.

The transfer opinion stated the controlling statute was not dispositive:

> "neither this provisions nor the raft of other statutes cited by the parties is dispositive of the issue before us." (Boostrom vs. Bach, 622 N.E. 2d 175, n. 1

The Ind. Supreme Court's opinion relied solely on Small Claims Rule 2 (A) and T.R. 5 (E). The dissent corroborates that the majority's opinion is dispositively based on "rules" (J.A. 13).

Respondent's Issue # 3 (D) : "The Indiana Supreme Court Merely Interpreted Indiana Common Law." (Resp't Br., p. 18).

Indiana, being a code state, does not have common law. Bach quotes at length the undisputed issue of the need to serve summons, but in Indiana the complaint is not filed when the summons is served. In contrast, an Alabama's Small Claims Rule E requires the complaint to be served before it is filed.[4]

Finally, Bach by implication argues that the Ind. Supreme Court's opinion is erroneous in stating Ms. Boostrom filed her complaint by certified mail on January 12, 1988. Bach contends: "The Indiana Rules of Evidence apply with equal force in small claims courts"(*Resp't Br.* p. 20). Bach is disproven by Indiana Supreme Court (1986) on "relaxing of the formal rules of evidence in small claims cases" in *State ex Re. Adams* v. *Hendricks Circuit Ct.*,497 N.E. 2d 549, 547. Also, cf.§ 33-5-2-1 *et seq.* (Burns 1985); and Small Claims Rule 8 (A). (J.A. 27-28).

Notice requirements to the general public

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[4] Alabama Small Claims' Rule E. Code of Alabama (1975), Vol. 23 1984 Replacement Volume, Vol. 23 1990 Replacement Volume, updated with 1993 Cumulative Supplement, Annotated.

for utility services are analogous to notice requirements to the general public in Small Claims courts. *Memphis Light, Gas and Water Division v. Craft*, 98 S. Ct. 1554 (1978). Without redress of injustice, some cannot pay utility bills.

The plain and clear simple English in Ind. Small Claims Rule 2 should enable any person to file the necessary papers, according to the Ind. legislature in Ind. Code § 33-11.6-4.6 (1990) (quoted in J.A. 28-29). The Ind. Supreme Court composed Ind. Sm. C. R. 2 and chose not to include a filing fee when considering the general public's situation. Any person cannot be required to do more than the law requires. *BFP v. Resolution Trust Corp*, U.S. Supreme Court (1994), 114 S. Ct. 1757; *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *TWA v. Franklin Mint Corp*, 466 U.S. 243, 262; *Delta Air Lines, Inc. v. August*, 450 U.S. 346(1981);and *Pipefitters Local Union No. 562 v. U.S.*, 407 U.S. 382. Statutory construction should be applied to Indiana Small Claims Rule 2 for due notice of law.

REPLY TO BRIEF IN OPPOSITION ON
PETITIONER'S QUESTION ONE PRESENTED FOR REVIEW

1. Granting the Petition for a Writ might help set standards for Small Claims courts. A motion for summary judgement hearing is more foreign to a typical Small Claims unrepresented party than an agency hearing in which a person might be unrepresented.

2. The right to a due process hearing on substantive rights in a judicial proceedings is protected by the U.S. Constitution. On the right to be heard, *Logan v. Zimmerman Brush Co. et al.*, U.S. Supreme Court (1981) stated:

" ... the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)

455 U.S. 422 at 380. To be noted, the Petitioner has always agreed that the courts need statutes of limitations and filing fees.

2. Indiana law requires a due process hearing on a motion for summary judgement.

The *Resp't Br.*, p. 8, argues no hearing is required; however, Bach made no such argument in his Indiana briefs. The law from only other jurisdictions, which he cites, does not control in Indiana.

Bach's argument can be found in *Otte v. Tessman* (1980)in which the Ind. Court of Appeals held: "Although the party against whom a motion for summary judgement is directed should have an opportunity to oppose such motion, it is not necessary in all cases that a formal hearing be scheduled and conducted." 412 N.E. 2d 1223, 1225-26. On transfer, the Ind. Supreme Court vacated the opinion of the Court of Appeals and remanded with instruction to set a time for a hearing on the motion for summary judgement pursuant to Tr. R. 56(C). *Otte v. Tessman*, 426 N.E. 660 at 661-662,Ind. Supreme Court (1980). Ind. T.R. 56 (C) used in *Otte* was in effect in 1990 in this case.

Bach relied on the provision of T.R. 73. However, the Indiana Supreme Court reinforced *Otte* in *Rumfelt v. Himes*, 438 N.E. 2d 980,

982-983 by stating that T.R. 73 is a general rule that does not control over a specific rule requiring a hearing, such as Ind. T.R. 56 (C) in *Otte* or Ind. T.R. 41(E) in *Rumfelt*.

The T.R. 56(C) requirement for a mandatory hearing has been overwhelmingly affirmed in ten (10) on-point opinions on summary judgements, following the Indiana Supreme Court decision in *Otte*. Effective since 1991, the Ind. Supreme Court amended Ind. T.R. 56 (C) to more explicitly state: "The court shall conduct a hearing on the motion which shall be held not less than ten (10) days after the time for filing the response." 1990 amendment.

Only after the Indiana Supreme Court decided *Otte* in 1980, did the Ind. Court of Appeals rule in 1981 that motions for summary judgement can be filed and heard in Ind. Small Claims courts. Cf. *Resp't Br.*, p. 21.

Reply to Respondent's Brief, p. 4-8:
"1. A Hearing Was Held On The Motion for Summary Judgement." (*Ibid.*, p. 4)

When the hearing opened (J.A.40-41) and

the Small Claims court might have intended to announce what motions it would try to hear that day, Bach entered into a long digression (J.A. 42; R 76-86). After that, the court considered Ms.Boostrom's request: "Could we at least correct the Court minutes first so we can get something on the record for all my time and expense in coming..." (J.A. 42; emphasis added). The court appeared to agree: "BY THE COURT: What's the need for correction? Okay, the Motion to Correct Minutes--." (J.A. 42). Bach interrupted and argued he wanted the petition to transfer heard first, but "if she wants to submit it on the merits" then he was in favor of the Motion to Correct Minutes being heard. The court appeared to state it was narrowing down consideration to only her motion and asked her: "Okay, specifically, what is it that we're talking about." (J.A. 43) and for a second time asked her to explain her motion; then she responded:" Well, it's just to correct the file date ..." (J.A.44; emphasis added). Her reply clearly shows her

Motion to Correct Minutes was based on technical grounds per T.R. 5 (E) and T.R. 60 (A), and it was not the sole defense to Bach's motion. Her exact reply "specifically" stated nothing about the statute of limitations.

The court stated it was hearing her motion, but never stated it was considering Bach's motion. J.A 42-43. Her motion was physically before the court: "BY THE COURT: Okay, I have a copy of it. I have found it." J.A. 44. Even though Boostrom's motion was the only one physically presented to the court, the resultant court action was on Bach's.

99 % to 1 % Ratio: The transcript has ninety-nine percent (99%) of its contents on other matters and one percent (1 %) on two questions by the court to only Bach about his motion (Cf. R. Tr. p. 97, ln. 3-20; J.A. 97). Bach agreed in his *Respondent's Brief*, p. 5, "...most of the hearing concerned Mrs. Boostrom's Motion to Correct Minutes...." By the court handling the disposition of the case as it did, Boostrom was denied a meaningful

hearing and opportunity to make any other defenses to Bach's motion.

In his *Respondent's Brief*, p. 5, Bach argued that the hearing of the Motion to Correct Minutes precluded any need for him to present his Motion for Summary Judgement. The ruling assumed the filemark date of the complaint was Ms. Boostrom's only defense against Bach's motion. J.A. 61-62. *Armstrong v. Manzo*, U.S. Supreme Court (1962), states:

> "A fundamental requirement of due process is the opportunity to be heard.[citation omitted]. It is an opportunity which must be granted *at a meaningful time and in a meaningful manner.*"

380 U.S. 545 at 552 (emphasis added). Bach, an attorney, did not present his motion in an orderly and meaningful way so that Boostrom as an unrepresented party could have understood his motion and presented a meaningful defense. Bach presented no oral argument, no exhibits, and no testimony during the hearing. If he had, then Ms. Boostrom would have been on notice his motion was being considered.

On June 4, 1990, Ms. Boostrom had filed

two responses to Bach's motion: "Plaintiff's Response to Damages Issue in Motion for Summary Judgement" (R.,p. 68) and "Plaintiff's Response to Statute of Limitations Issue in Motion for Summary Judgement" (Cf. R.p. 35) which were never heard and were ignored by the court. The error of record of the small claims court that Ms. Boostrom filed no response to Bach's motion for summary judgement except the Motion to Correct Minutes was carried over and repeated in various Indiana opinions.

After the court had asked several personal questions of the Plaintiff, Bach tried to present his motion, Ms. Boostrom objected (R. Tr.p.108,ln. 4-10), and the court stopped Bach. "I just--I'm trying to determine at this time [emphasis added] the filing fee." (R. Tr.p. 108, ln. 98).

At the end of a sustained hearing on her "Motion to Correct Minutes," Bach again tried to present his Motion for Summary Judgement, and Boostrom strongly objected. It appeared the court agreed to her request:

"MS. BOOSTROM: But I don't want the Motion for Summary--
BY THE COURT: --and he's trying to answer me.
MS. BOOSTROM: -- Judgement to be heard until we determine this date.
BY THE COURT: Okay, I'll make a determination on that date."
(Record, Tr., p. 116, ln. 3-8)

Based on the court's statement, Ms. Boostrom expected a future hearing in which she could respond to Bach's motion. The court's ruling simultaneous on two motions surprised her, as the court had indicated it would rule on her motion *before* hearing Bach (R.,p.116-117).

The Respondent's Brief, p. 22: "Mr. Bach presented uncontroverted evidence that the withdrawal of his representation of Mrs. Boostrom in the underlying lawsuit was accomplished without adverse effect to her."

On the contrary, Bach presented no evidence. Bach did not present into evidence the withdrawal order, yet he bases his whole current argument on it. Bach apparently came prepared to file exhibits, since he filed Defendant's Exhibit No. 1 from an estate in which Ms. Boostrom was an heir. Bach proffered no exhibits. The transcript shows that damages were unheard. Also see the Court

of Appeals rehearing opinion, section III, stating damages were not heard. J.A.30-33. The Indiana Supreme Court did not address damages.

Also, the Respondent argues the Indiana Supreme Court opinion interpreted Indiana malpractice law (*Resp't Br.*, p. 18-19), but therein no malpractice law is cited to be interpreted. Malpractice accrual occurs when the breach meets damages, not when a contract is breached. Cf. Indiana malpractice law in *Shideler v. Dwyer*, 417 N.E. 2d 281, Ind. App. (1981), upheld and discussed by the Ind. Supreme Court in *Barnes v. A.H. Robins*, Ind. 476 N.E. 2d 84 (Ind. 1985); and *Johnson v. Cornett*, Ind. App. (1985), 474 N.E. 2d 518. See also the ABA/BNA Code 301:908 on accrual. By Indiana malpractice law, damages during representation occurred on August 5, 1991, the final judgement date in the underlying cause.

The U.S. Supreme Court in *Fuentes v. Shevin* (1972) 407 U.S. 67 at 80, 87, stated:

> "...The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing."

Ms. Boostrom does not need to show she would prevail to be entitled to a hearing. By Small Claims Rule 4(A) Preservation of Defenses, J.A. 75, all defenses are preserved until a hearing. However, her defenses include:

1) The accural date is the date of final judgement in the underlying cause. See above.

2) There is no evidentiary basis for the Ind. Supreme Court's statement that January twelfth, 1990 was "the same day the statute of limitations was to run on her right of action." In addition, on January 12th, 1988, Bach was still actively representing Ms. Boostrom (Docket, Entry of Service to Bach on 1-12-88 R.136), and he didn't file his motion to withdraw until a week later on January 19, 1988 (R. p. 135). Where services were rendered under an entire continuous contract, Ind. law is well-established[1] the statute does not begin to run until when the services cease *and* damages meet the breach of contract.

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[1] *Little v. Smiley*, 9 Ind. 116 (1857), *Schoonover v. Vachon*, 22 N.E. 777(1889); *Story v. Story*,27 N.E. 573 (1891); *Taggart v. Tevanny*, 27 N.E. 511(1891).

3) There is equitable estoppel for a filemark date of February 5, 1988 because on January 12, 1988 by certified mail Ms. Boostrom put her telephone number on her complaint: "*Phone: (812)339-9332*" (R, p. 6). The Clerk failed to call her collect, but wrote to request a money order and did not state that the complaint wasn't filed (R.32).

4) The "discovery" rule and concealment of a cause of action (I.C. 34-1-2-9) are defenses for any January, 1988 accrual date.

5) "The doctrine of equitable estoppel may bar a party from reliance on defense of statute of limitations." *Barnd v. Borst*, 431 N.E. 2d 161 (Ind. App. 1982). (A) Bach did not file his representation contract on January 19, 1988, so he is estopped to use that date. (B) Bach failed to give the required advance notice to his client by local rule 5 (J.A. 72) prior to the hearing date when her contractual interests were involved. (C) The order approving withdrawal was entered nunc pro tunc to January 19, 1988 without the required

notification under Ind. T.R. 72 (D) and the hearing requirement of the Supreme Court of Indiana in *Stowers v. State*, 363 N.E. 2d 978 at 983.

CONCLUSION

For all the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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